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Agenda item 9

THE ADMINISTRATION OF JUSTICE AND HUMAN RIGHTS

Report of the sessional working group on the administration of justice

Chairman-Rapporteur: Mr. Louis Joinet

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Introduction

1. In accordance with the decision taken by the Sub-Commission on 5 August 1997, a sessional working group of the Sub-Commission on the administration of justice held its first meeting on 6 August 1997. The following experts were appointed as members of the working group on 6 August 1997: Mr. Stanislav Chernichenko (Eastern Europe), Mr. Alberto Diaz Uribe (Latin America), Ms. Lucy Gwanmesia (Africa), Mr. Louis Joinet (Western European and other States) and Mr. Sang Yong Park (Asia).

2. The working group held three meetings, on 6, 11 and 15 August 1997.

3. A representative of the Centre for Human Rights opened the session of the working group.

4. The working group designated Mr. Louis Joinet as Chairman-Rapporteur for its 1997 session.

5. The following members of the Sub-Commission not members of the working group also took part in the general discussion: Mr. Miguel Alfonso Martínez (1st and 2nd meetings), Mr. Fix Zamudio (1st meeting), Mr. El-Hadji Guissé (1st and 2nd meetings), Ms. Claire Palley (1st and 2nd meetings) Mr. Fan Guoxiang (1st meeting) and Mr. Zhong Shukong (2nd meeting).

6. The working group had before it the following documents relating to its provisional agenda:

Working paper submitted by Mr. Miguel Alfonso Martínez concerning the study of the issue of the privatization of prisons (E/CN.4/Sub.2/1991/56);

Outline prepared by Ms. Claire Palley pursuant to Sub-Commission decision 1992/107 on the possible utility, scope and structure of a special study on the issue of privatization of prisons (E/CN.4/Sub.2/1993/21);

Expanded working paper submitted by Mr. Stanislav Chernichenko in accordance with decision 1996/116 of the Sub-Commission on recognition of gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them as an international crime (E/CN.4/Sub.2/1997/29);

Conference room paper prepared by Mr. David Weissbrodt on habeas corpus, amparo and similar procedures as non-derogable rights (E/CN.4/Sub.2/1997/WG.1/CRP.1);

Report of the sessional working group on the administration of justice and the question of compensation on its 1996 session (E/CN.4/Sub.2/1996/16).

Adoption of the agenda

7. At its 1st meeting, the working group considered the provisional agenda. At the suggestion of the Chairman-Rapporteur, based on formal and informal consultations with other members of the working group, the working group decided to adopt the following agenda:

1. Follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance.

2. Issues related to the deprivation of the right to life, with special reference to:

   (a) Imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled;

   (b) Summary, arbitrary and extrajudicial executions.

3. Habeas corpus as a non-derogable right [and as one of the requirements for the right to a fair trial].

4. Measures to be taken to give full effect to the Convention on the Prevention and Punishment of the Crime of Genocide.

5. Juvenile justice.

6. Privatization of prisons.

7. Recognition of gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them as an international crime.

8. Provisional agenda for the next session.

9. Adoption of the report of the working group to the Sub-Commission.

I. FOLLOW-UP MEASURES TO THE DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

8. The Chairman-Rapporteur stated that, because of the financial difficulties encountered by the High Commissioner/Centre for Human Rights, it had not been possible to hold, as had been hoped, a small drafting meeting to improve the preliminary draft, with the object of facilitating the task of the Working Group. It had therefore not been possible to examine and revise the preliminary draft. The Chairman/Rapporteur considered that such a meeting might take place in the autumn of 1997 and he therefore suggested that consideration of the agenda item should be postponed until the next session of the Working Group.

II. ISSUES RELATED TO THE DEPRIVATION OF THE RIGHT TO LIFE

9. Mr. Guissé, who had been asked to submit a follow-up report on the evolution of capital punishment*, said that the recent evolution of that penalty had been marked by ups and downs. A progress report on the abolition and maintenance of the death penalty throughout the world had been drawn up. According to reports by Amnesty International, the number of countries which

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* The report, in its original French version, is available in the secretariat of the Centre for Human Rights.

had abolished the death penalty by legislation was now 54; in 15 countries it had been legally abolished except for war crimes, and 27 countries had not applied the death penalty for more than 10 years. Regarding the latter cases, he emphasized the desirability of moving on to legal abolition, which would constitute a better safeguard.

10. In 1995, according to the same reports, 97 countries were applying the death sentence. Mr. Guissé had noted a substantial rise in the number of executions in those countries and he drew attention to the discrimination suffered by certain categories of persons as regards application of the death penalty. He also referred to the frequency of summary executions, enforced disappearances and cruel treatment, which were rarely condemned by the Governments concerned.

11. Mr. Guissé then went on to refer to the categories of persons who were particularly vulnerable. Minors should benefit from a reduction of criminal responsibility on the grounds of their lack of maturity. Similarly, for humanitarian reasons, capital punishment should not be imposed on pregnant women or on mothers of young children. Furthermore, the mentally ill and the mentally disabled should not be held criminally responsible, because such patients lacked discernment. That measure could also be extended to older persons.

12. Finally, with a view to encouraging abolition of the death penalty, he referred to practices which guaranteed a fair trial, such as the appointment of counsel by courts, legal aid, personality investigation and the abolition of special courts. At the international level, he suggested that the United Nations should undertake a study of substitutes for the death penalty, with the aim of supporting the efforts of those countries which wished to institute alterative penalties that were socially and juridically useful.

13. The Chairman-Rapporteur suggested that Mr. Guissé should continue to prepare his annual follow-up report on the matter. Both Mr. Guissé and the Working Group approved that suggestion.

III. HABEAS CORPUS AS A NON-DEROGABLE RIGHT AND AS ONE OF THE REQUIREMENTS FOR THE RIGHT TO A FAIR TRIAL

14. The Chairman-Rapporteur asked Mr. Weissbrodt to introduce the paper he had prepared on the basis of a request by the sessional working group at its 1996 session (see E/CN.4/Sub.2/1996/16). His paper was entitled Habeas corpus, amparo and similar procedures as non-derogable rights, (E/CN.4/Sub.2/1997/WG.1/CRP.1). In introducing his paper Mr. Weissbrodt referred to: (a) the recommendations of the final study of Ms. Nicole Questiaux, then Special Rapporteur on states of emergency (E/CN.4/Sub.2/1982/15); (b) the recommendations of the Sub-Commission's Special Rapporteur on human rights and states of emergency, Mr. Leonardo Despouy; (c) the efforts of the working group on the administration of justice and the question of compensation (and its predecessor working group on detention) to strengthen safeguards for the writ of habeas corpus; (d) the Sub-Commission's drafting and the subsequent adoption of the Declaration on the Protection of All Persons from Enforced

Disappearance; (e) the Sub-Commission's study on the right to a fair trial and a remedy; and (f) Sub-Commission resolution 1991/15, subsequently adopted by the Commission as resolution 1992/35, which called upon all States that had not yet done so to establish a procedure such as habeas corpus by which anyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that the court may decide without delay on the lawfulness of his or her detention and may order his or her release if the detention is found to be unlawful and to maintain the right to such a procedure at all times and under all circumstances, including during states of emergency.

15. Mr. Weissbrodt noted that he had been asked to consult, and had in fact consulted, with the Chairman-Rapporteur and Mr. Hector Fix Zamudio, alternate member from Mexico, who was a recognized expert on amparo. Mr. Weissbrodt proposed that the working group prepare a draft decision for the Sub-Commission asking the Chairman-Rapporteur to send a letter to Ms. Christine Chanet, President of the Human Rights Committee, recommending that the Committee consider preparing a new general comment on article 4, which would reaffirm the developing consensus that habeas corpus and the related aspects of amparo, as well as cognate rights, should be considered to be non-derogable.

16. Mr. Guissé noted the great importance of procedures such as habeas corpus and indicated that further consideration needed to be given to how to make such procedures effective in the national context. The Chairman-Rapporteur asked Mr. Fix Zamudio and Mr. Weissbrodt whether they would be willing to prepare a report for the 1998 session along the lines suggested by Mr. Guissé. Mr. Fix Zamudio confirmed that he agreed with the substance of Mr. Weissbrodt's present paper, referred to the experience of the Inter-American Court of Human Rights, and agreed to prepare a further report as suggested by Mr. Guissé and in consultation with Mr. Weissbrodt. Ms. Gwanmesia spoke about the importance of the writ of habeas corpus and its application in her country.

17. Mr. Alfonso Martínez expressed the view that it would be preferable if the Sub-Commission's views on this important issue could be conveyed to the Human Rights Committee in a more formal fashion. The question offered a suitable opportunity to foster cooperation between the Sub-Commission and a treaty body. In addition, he had strong concerns about one particular paragraph of the letter suggested in document E/CN.4/Sub.2/1997/WG.1/CPR.1.

18. Mr. Guissé and Ms. Gwanmesia said that both the content of any communication with the Human Rights Committee and the way it would be addressed to the Committee should be approved by the plenary of the Sub-Commission.

19. Mr. Weissbrodt indicated that the paragraph mentioned by Mr. Alfonso Martínez was not necessary.

20. The Chairman-Rapporteur indicated that he had consulted informally with the President of the Human Rights Committee and it appeared that the Committee would be prepared to consider the suggestion contained in Mr. Weissbrodt's paper.

21. The Chairman-Rapporteur proposed that the working group recommend a draft decision to the Sub-Commission by which it would send a copy of the report of the 1997 session of the working group on the administration of justice which would contain the substance of the content of document E/CN.4/Sub.2/1997/WG.1/CRP.1, as modified in the light of the discussion.

22. The working group decided to recommend to the Sub-Commission that it adopt a decision (a) calling on the Human Rights Committee to consider preparing a new general comment on article 4, reaffirming the developing consensus that habeas corpus and the related aspects of amparo, as well as cognate rights, should be considered to be non-derogable at all times and under all circumstances, including during states of emergency; (b) calling upon all States to incorporate in their domestic law provisions making habeas corpus a non-derogable right; and (c) conveying to the Human Rights Committee a copy of the report of the 1997 session of the working group which would contain the substance of the recommendation contained in E/CN.4/Sub.2/1997/WG.1/CRP.1, as modified in the light of the discussion.

23. The proposed text of the communication to the Human Rights Committee reads as follows:

> "The sessional working group on the administration of justice of the Sub-Commission on Prevention of Discrimination and Protection of Minorities has for several years been considering how to reaffirm that the right to habeas corpus and similar aspects of amparo is non-derogable under article 4 of the International Covenant on Civil and Political Rights.
>
> "While the Covenant does not use the terms 'habeas corpus' or 'amparo', it contains several provisions which guarantee the essence of the habeas corpus writ and aspects of the amparo procedure which are similar in impact to habeas corpus. Article 9 (3) states: 'Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release ...' Article 9 (4) states: 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'
>
> "The right to habeas corpus and related aspects of amparo are also inherent in article 2 (3), which states:
>
> > 'Each State Party to the present Covenant undertakes:
> >
> > '(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> >
> > '(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

'(c) To ensure that the competent authorities shall enforce such remedies when granted.'

"Article 4 indicates those rights which are considered to be non-derogable and the Human Rights Committee in 1981 issued a very brief general comment on that provision.

"Although habeas corpus and the related aspects of amparo for challenging detention were not expressly made non-derogable under article 4 of the International Covenant on Civil and Political Rights, habeas corpus/amparo has gradually been recognized as non-derogable. These developments have occurred because of the recognition that without the ability to challenge the legality of one's detention, especially in times of public emergency, one will never be assured of the other fundamental rights in the Covenant.

"Two Advisory Opinions issued by the Inter-American Court of Human Rights have concurred in holding that habeas corpus and amparo - the legal remedies guaranteed in articles 7 (6) and 25 (1) of the American Convention - may not be suspended, even in emergency situations, because they are among the 'judicial guarantees essential' to protect the rights whose suspension article 27 (2) of the American Convention prohibits (Advisory Opinion of 9 May 1986, Inter-Am. C.H.R., 13 OEA/Ser.L/III.15, doc. 14 (1986) and Advisory Opinion of 6 October 1987, Inter-Am. C.H.R. 13 OEA/Ser.L/V/III.19, doc. 13 (1988)). In the first Advisory Opinion, the Court pointed out that habeas corpus performs a vital role in assuring that a person's life and physical integrity are respected. In its second Advisory Opinion, the Inter-American Court stated that the 'essential' judicial guarantees that are not subject to derogation according to article 27 include habeas corpus, amparo, and any other effective remedy before judges or competent tribunals which is designed to guarantee respect for the rights and freedoms whose suspension are not authorized by the American Convention.

"It has been more than 15 years since the Human Rights Committee issued its general comment on article 4 of the Covenant. Since that time there has been a very significant trend (a) in the country conclusions of the Human Rights Committee, (b) in the overall recognition of habeas corpus and related aspects of amparo, and (c) the basic provisions on the right to a fair trial in article 14 (1) as to the understanding of non-derogability within the meaning of article 4. Indeed, there have been other important developments in the general understanding of non-derogable rights which would justify a revision of the general comment on article 4.

"Several years ago the Sub-Commission asked the Human Rights Committee for its views as to the possible elaboration of a third optional protocol to the International Covenant on Civil and Political Rights aiming at making the right to a fair trial and a remedy non-derogable. The Human Rights Committee discouraged the elaboration of such a third optional protocol on the ground that there is an evolving recognition of that right as non-derogable. Because of the Human Rights Committee's

advice, the Sub-Commission did not pursue the idea of a third optional protocol. If the Committee pursues the idea of issuing a revised general comment on article 4, however, it might be appropriate for the Committee also to consider whether it would want to reconfirm that the basic substance of article 14, for example as found in article 14 (1), is non-derogable.

"Accordingly, it is recommended that the Human Rights Committee consider preparing a new general comment on article 4 which reaffirms the developing consensus that habeas corpus and the related aspects of amparo, as well as cognate rights, should be considered to be non-derogable."

IV. MEASURES TO BE TAKEN TO GIVE FULL EFFECT TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

24. Mr. Joinet introduced his working paper on measures to be taken to give full effect to the Convention on the Prevention and Punishment of the Crime of Genocide. After recalling that the tragic events in Rwanda and the former Yugoslavia had been the reason for the inclusion of the item in the working group's agenda, he explained the relationship between his study and the work previously done by Mr. Nicomède Ruhashyankiko in 1978 ("Study on the question of the prevention and punishment of the crime of genocide", E/CN.4/Sub.2/416) and by Mr. Ben Whitaker in 1985 ("Revised and updated report on the question of the prevention and punishment of the crime of genocide", E/CN.4/Sub.2/1985/6 and Corr.1). He pointed out, however, that the working paper was more a pragmatic study than an updating of the previous studies.

25. Mr. Joinet said that he favoured drawing up an inventory of the reference norms and analysing their scope, distinguishing between treaty norms, particularly the Convention on the Prevention and Punishment of the Crime of Genocide, and declarative or jurisdictional statutory norms relating to the question of genocide developed by various international bodies, including the International Court of Justice at the Hague. He had contemplated drawing up a list of the matters that had been omitted from the Convention, which was the first such instrument in the history of the United Nations but which had never been implemented. That Convention constituted a facade, but, in the area of genocide, there was still a juridical vacuum. He then mentioned a number of proposals that had been made with the object of remedying those deficiencies, namely the inclusion of a quantitative criterion in the definition of genocide and extension of the scope of the Convention to various categories of genocide. He had preferred, however, to confine the study to the question of political genocide. At the criminal level, it was desirable to encourage proposals concerning genocide by omission or by complicity and rejection of the doctrine of "owed obedience". States might be made responsible for instituting a juridical basis and establishing an obligation of compensation. Reviewing the accessions to the Convention, he said that 107 States had ratified the instrument; initiatives should be encouraged for the provision of technical assistance to States which had not yet ratified the Convention or which had not taken the legislative steps necessary for its implementation. He suggested that a list should be made of the deficiencies of the Convention in the matter of prevention of genocide.

26. Finally, Mr. Joinet said that priority should be given to measures for encouraging prevention of the crime of genocide, by defining two areas: repressive measures and incentives designed to combat incitement to and provocation of genocide and the role of a working group on prevention of genocide. He emphasized that such a body should be distinct from any international criminal court, which could not function effectively for many years. Such a working group would have both a preventive and a repressive role to play. He referred to the work done by Mr. Cherif Bassiouni on the investigations conducted in the former Yugoslavia. The purpose would be to facilitate the task of a future international jurisdiction. He suggested that the report should be submitted at the next session of the Sub-Commission.

27. Ms. Palley stated that a cautious approach must be taken towards any developments regarding the Genocide Convention. In particular, she emphasized that there was a clear enforcement mechanism embodied within article 9 of the Convention, which outlined the compulsory jurisdiction of the International Court of Justice over cases of genocide. She did not advise revising this mechanism, but she did suggest an additional protocol to the Convention which would expand the definition of the crime of genocide. Ms. Palley stressed, however, that she had doubts even about this second approach, which might, through the creation of categories such as "ethnocide", or even "ecocide", cast doubts upon the strong established jus cogens status of the traditional crime of genocide itself. Ms. Palley concluded by emphasizing the need to encourage States to employ the International Court of Justice in cases of genocide, particularly given the potential for the Court to apply interim measures in such cases.

28. Mr. Guissé said that it was necessary to make progress with regard to the definition of genocide, which had remained the same since 1948, by including in it the concepts of cultural, political and economic genocide. Although genocide was considered a crime against humanity not subject to prescription, that definition had never been given effect. He therefore suggested that consideration of the study should be postponed until the following year, when a second version of the working paper could take those comments into account. He reaffirmed his belief in the need to make progress with the Convention so that it might help to solve the problems encountered at the national level.

29. Mr. Chernichenko supported Ms. Palley's statement and also suggested that the existing concept and mechanism of the Convention should not be revised. An additional protocol could provide for punishment of "ecocide", for example. However, he was against including in the definition the notion that any mass killings constituted the crime of genocide.

30. Replying to an observation by Ms. Palley, Mr. Joinet explained that his statement reflected the issues that could be defined as a result of the questions asked by the Commission, and not his personal opinion, which was that nothing should be done to the 1948 Convention. Making too many changes in order to improve it would, on the contrary, be liable to hamper any positive progress in combating genocide. The pragmatic approach would be to avoid any reform of the Convention and to consider only one or two specific

proposals based on existing initiatives. The Working Group agreed to the proposal to continue consideration of the working paper at the next session in the light of the observations made by members of the Group.

V. JUVENILE JUSTICE

31. At the 1st meeting of the working group, Ms. Gwanmesia, in accordance with the request made by the working group at its 1996 session, presented a working paper on juvenile justice*. She pointed out the main elements of the nature of the juvenile offender and of juvenile justice, following the provisions contained in the relevant international instruments. She especially drew the attention of the working group to the following: (a) the need for a juvenile justice system, in particular the establishment of juvenile courts in each country; (b) custody pending trial; (c) proceedings of trials involving juveniles; (d) sentencing of juveniles; (e) separation of juveniles from adults at all stages. She urged that probation officers be appointed and that special institutions be established for the rehabilitation of juvenile offenders.

32. Ms. Gwanmesia reiterated the recommendations contained in the relevant international instruments, in particular the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). She particularly emphasized three issues: initiatives should be explored to exclude pornographic pictures from the cinema and television because of the harm they might cause to children; the need to indicate in the Convention on the Rights of the Child the respect and love that children owe to their parents; the negative consequences of the involvement in armed conflicts and sex tourism, lack of education and early marriage on the normal development of a child's personality.

33. Mr. Guissé pointed out that the question of defining the age of minority had already been considered in Roman law. He wondered, in fact, whether Ms. Gwanmesia's report did not go beyond the limits of the subject proposed. Juvenile justice was concerned with children who were in conflict with the law or justice. The questions of the parents, exclusion of the press and the personality development of children therefore did not form part of the basic subject, namely "the administration of justice". The improvement of justice could only result from the introduction of rules to protect children in criminal and civil cases, but should not exceed those limits, so as to avoid any conflict with the Convention on the Rights of the Child.

34. Ms. Palley expressed her disagreement with the proposed inclusion in the Convention on the Rights of the Child of the obligation of the child to respect and love the parents. In her view, it was difficult to integrate the issues of the rights of parents and child/parents relations into the Convention, and in any case good emotional relationships could not be legislated.

35. The Chairman-Rapporteur noted that juvenile justice was a prominent subject within the Commission on Human Rights and the Commission on Crime Prevention and Criminal Justice. Therefore, in order to avoid overlapping, the issue needed a very specific mandate in the framework of the working group. He suggested that Ms. Gwanmesia contact those organs and the

Committee on the Rights of the Child, through the Secretariat, for consultation and coordination, and that an inventory of the activities of United Nations bodies in this field should be the focus of the working paper for the next session of the working group. Ms. Gwanmesia underlined that her mandate for the present session was too general to have allowed her to draft a more specific document. The paper for the next session would focus on three issues: preliminary investigation, trial of juveniles and follow-up of the sentence.

36. At the 2nd meeting, Mr. Weissbrodt provided the working group with a document concerning the development of guidelines in order to facilitate the implementation of the provisions of the Convention on the Rights of the Child and to encourage the countries which had not done so to ratify the Convention*. Noting that, up to now, no general comments on the Convention on the Rights of the Child existed, Mr. Weissbrodt recommended that the Committee on the Rights of the Child begin to elaborate comments with the aim of clarifying and concretizing States' obligations under the Convention. He also noted that the Committee had already begun a similar practice by developing a remarkable jurisprudence in its comments on States parties' reports. As regards juvenile justice, one of the main observations made by the Committee was that the Convention's provisions had to be interpreted in the light of other relevant United Nations standards in the field, in particular the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

37. In his document, Mr. Weissbrodt carried out an in-depth analysis of articles 37 and 40 of the Convention on the Rights of the Child with regard to juvenile justice and its administration. In his opinion, taking into account that juveniles deserved a higher level of protection than adults, the Convention indeed provided appropriate safeguards in order to ensure the rights of juvenile detainees. The development of general comments on the Convention would contribute considerably to the general growing awareness of child-related problems, in particular those concerning the field of juvenile justice.

38. Mr. Park, Mr. Joinet, Mr. Alfonso Martínez and Mr. Fan expressed their support and appreciation for Ms. Gwanmesia's study and Mr. Weissbrodt's proposal. In this connection, Mr. Alfonso Martínez stated that Mr. Weissbrodt's proposal should be brought to the attention of the Sub-Commission and eventually transmitted to the Committee on the Rights of the Child. It was decided to keep the issue of juvenile justice on the agenda of the next session of the working group.

VI. PRIVATIZATION OF PRISONS

39. At the 2nd meeting, Ms. Palley introduced her outline on the privatization of prisons, an issue that had been considered by the Sub-Commission since 1988. Noting that the privatization of prisons was gaining ground, Ms. Palley stated that, especially in those countries where corruption was a serious problem, the human rights of detainees could be massively violated and all manner of abuses permitted. The fact that building industry enterprises and security companies were sometimes linked to organized

crime could be seen as an additional element which would definitively worsen the general picture. Noting that the appointment of a special rapporteur had now become advisable, Ms. Palley drew the attention of the working group to five issues: the legality of privatization under international human rights law; the extent of delegation of duties possible under privatization; the question of whether United Nations standards must be further developed; the minimum safeguards required; the most appropriate human rights monitoring method for private prisons.

40. Mr. Alfonso Martínez confirmed that privatization processes applied to the judicial machinery had been a main concern of the Sub-Commission in the 1980s, but because of the historical period no action had been taken since then. Times had changed and this year seemed more propitious for the Sub-Commission to propose the appointment of a special rapporteur who could first refer to the working group and then to the plenary of the Sub-Commission.

41. Mr. Weissbrodt pointed to a recent United States of America Supreme Court decision in which the Court ruled that managers of private detention facilities were ascribed greater civil responsibility than managers of public detention facilities. In Mr. Weissbrodt's view, this decision could have financial implications that would discourage private companies from managing penitentiary institutions.

42. Mr. Guissé expressed his concern that the privatization of prisons could contribute to depriving the State of the responsibility for the administration of civil and criminal justice, which would become ineffective. State control was absolutely necessary in order to guarantee respect for detainees' rights.

43. Mr. Zhong stated that no single formula was feasible on this question because of the differing conditions in countries and issues of sovereignty and rule of law. Therefore, caution was necessary at this stage and the final decision concerning the privatization of prisons should be left to the individual countries' relevant authority.

44. Ms. Gwanmesia believed that the privatization of detention facilities was inconsistent with the texts of several human rights instruments, especially the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in which expressions such as "public officials" and "public authority" were used. She questioned the quality of privatized detention facilities, notably with regard to the rights of detained juveniles.

45. Mr. Alfonso Martínez agreed that the question of civil and even criminal responsibility must be included in any study on the subject. He also stressed that, as profits were the ultimate goal of privatization, the rehabilitation of the offender might well suffer in privatized prisons. He proposed that a draft resolution be presented to the Sub-Commission on the subject. This proposal met with the agreement of the group.

46. The working group therefore decided to recommend that the Sub-Commission be authorized to appoint one of its titular experts as a special rapporteur to

undertake an in-depth study on all issues relating to the privatization of prisons, including the possible civil responsibility of enterprises and their employees managing private prisons.

VII. RECOGNITION OF GROSS AND MASSIVE VIOLATIONS OF HUMAN RIGHTS PERPETRATED ON THE ORDERS OF GOVERNMENTS OR SANCTIONED BY THEM AS AN INTERNATIONAL CRIME

47. Mr. Chernichenko introduced his expanded working paper on the subject. The purpose of the paper was to encourage further action against human rights violations, the most dangerous of which were gross and massive violations perpetrated on the orders of Governments or sanctioned by them. The working paper contained a draft declaration declaring this category of human rights violation to be an international crime.

48. Some violations of this type had already been recognized as international crimes, for example, genocide and apartheid. Another step forward should now be taken by proclaiming that all gross and massive violations of human rights perpetrated on the orders of Governments, or sanctioned by them, constituted an international crime. International crime was not a crime in a literal sense of the word, i.e. an act violating criminal law. Rather, it was the most serious violation of international law committed by a State and represented a danger for the entire international community. Any act committed on the order of a Government or sanctioned by it constituted an act of State, which was precisely why the question arose as regards the recognition of gross and massive human rights violations as international crimes.

49. In his paper a "Government" was understood to mean the authorities of the State which acted in its name and were in control of the country. The word "Government" could be replaced by the "ruling power".

50. The working paper did not duplicate the work of the International Law Commission, which dealt with the responsibility of States in general and not with human rights issues. The Commission also dealt with the draft Code of Crimes against the Peace and Security of Mankind, which provided for criminal responsibility of individuals for the commission of a number of acts which threatened the international community.

51. The draft declaration annexed to the working paper did not concern international crimes in general, or the responsibility of States for those crimes; it was also not concerned with the criminal responsibility of individuals who committed the acts threatening the peace and security of mankind. It only stated that a certain category of human rights violations should be recognized as international crimes and should entail the responsibility of those persons who had used a State as a tool to commit them.

52. The draft did not set the task of providing for concrete measures of responsibility and a mechanism for carrying them out. Its goal was rather to proclaim a principle: if we considered that a State should bear the same kind of responsibility for acts it deliberately committed and which represented gross and massive violations of human rights as it bore for aggression, for

example, then we should recognize that those violations are in fact violations of international law of the same character as aggression, in other words, an international crime.

53. The members of the working group, after exchanging opinions on the paper, decided that it could discuss the draft declaration if the continuation of this work were sanctioned by the Sub-Commission. The Sub-Commission could also decide to send the paper directly to the International Law Commission for its information.

54. Mr. Weissbrodt stated that Mr. Chernichenko's important work greatly assisted the group's understanding of relevant aspects of international law, particularly in defining gross and massive violations of human rights. He found the concept of the study very useful. Given the size and importance of the study, however, he proposed discussing the work next year; he also suggested that the study might be forwarded to the International Law Commission, in the hope that it would send comments and advise the working group on how to proceed regarding the issue.

55. Mr. Guissé said that he had been wondering about the size of the study, which was similar to that of a final report. He stressed the need precisely to define the purpose of the study. The subject had already been dealt with by the International Law Commission. The latter's report, which he had examined, proposed that a code of international criminal law should be drawn up. The purpose of developing international criminal law was to establish the responsibility of States, but also that of individuals. In that connection, he recalled the jurisprudence of the Nuremberg Tribunal concerning manifestly unlawful orders and the development, in the 1970s and 1980s, of the concept of international subjectivity, in other words recognition of the individual at the international level. He added that the French Court of Cassation, in its judgement in the Barbie case, had clearly established the principle of responsibility of the individual and the concepts of universal justice and universal competence. He expressed some doubt as to the usefulness of such a study inasmuch as the International Law Commission had already gone deeply into the subject. It was necessary to avoid weakening the scope of the international norm, which had already been considerably reduced by the many reservations entered by States. Those texts would become unnecessary if the Sub-Commission produced a further one. The rule laid down by the French Court of Cassation was sufficiently explicit on the question of the responsibility of the individual before an international criminal jurisdiction.

56. Mr. Park found the working paper very informative and analytical. Nevertheless, he raised some questions about the substance of the study. Concerning paragraph 68, he questioned what procedure could be applied if a State, first, did not voluntarily acknowledge its responsibility and, second, if the international community failed to take coercive measures against the State concerned. Those issues needed further elaboration.

57. Ms. Palley expressed the wish that the Sub-Commission would consider the draft declaration prepared by Mr. Chernichenko, and stated that it was unfortunate that no resources were available for the Sub-Commission to undertake longer studies or papers.

58. Mr. Zhong, thanking Mr. Chernichenko for his work, stated that, in order fully to grasp the study's concepts, the paper should be presented next year, with the author taking into account the comments made during the present meeting.

59. Mr. Chernichenko pointed out that he had been requested by the Sub-Commission to prepare an expanded working paper. He reiterated that his study did not duplicate the work of the International Law Commission.

60. Mr. Joinet pointed out that the Commission on Human Rights regularly emphasized the need for effective cooperation between the various organs of the United Nations. He had therefore thought it wise to submit the document for comment to the International Law Commission, in order that the Sub-Commission might work on it in the following year. It was decided that the procedure to be followed would be the same as that adopted for the document on habeas corpus.

61. The working group recommended the following draft decision to the Sub-Commission:

> "The Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to request the working group on the administration of justice to continue its consideration of the expanded working paper prepared by Mr. Stanislav Chernichenko entitled Recognition of gross and massive violations of human rights perpetrated on the orders of Governments, or sanctioned by them as an international crime (E/CN.4/Sub.2/1997/29) and for this purpose to transmit the expanded working paper, through the Secretary-General, to the International Law Commission, so that the Commission's comments may be considered at the next session of the working group."

VIII. PROVISIONAL AGENDA FOR THE NEXT SESSION

62. At its 2nd meeting, the working group adopted the following provisional agenda for its next session:

1. Election of officers.

2. Adoption of the agenda.

3. Follow-up measures to the Declaration on the Protection of All Persons from Enforced Disappearance.

4. Issues related to the deprivation of the right to life, with special reference to:

   (a) Imposition of the death penalty on persons of less than 18 years of age and on the mentally and physically disabled;

   (b) Summary, arbitrary and extrajudicial executions.

5. Habeas corpus as a non-derogable right [and as one of the requirements for the right to a fair trial].

6. Measures to be taken to give full effect to the Convention on the Prevention and Punishment of the Crime of Genocide.

7. Juvenile justice.

8. Privatization of prisons.

9. Recognition of gross and massive violations of human rights perpetrated on the orders of Governments or sanctioned by them as an international crime.

10. Provisional agenda for the next session.

11. Adoption of the report of the working group to the Sub-Commission.

IX. ADOPTION OF THE REPORT OF THE WORKING GROUP TO THE SUB-COMMISSION

63. At its 3rd meeting, on 15 August 1997, the working group unanimously adopted the present report to the Sub-Commission.

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